



ultimately affirmed on July 22, 2004. (Mot. to Dismiss at 2; Ex. 2.) Petitioner did not seek direct review in the state high court. Rather, on April 20, 2004, Petitioner filed a habeas petition with the California Supreme Court, which denied the petition without comment on March 16, 2005. (Id., Ex. 4.) Petitioner filed a second habeas petition in the state high court on June 23, 2005, which the court denied on May 10, 2006. (Id., Ex. 6.)

On June 27, 2006, Petitioner filed a federal petition for writ of habeas corpus in this Court, raising five claims which were denied on the merits on April 22, 2008. Hernandez v. Woodford, No. 06-3975 WHA (PR) (N.D. Cal.). (Id., Ex. 8.)

On April 29, 2009, Petitioner filed another petition for writ of habeas corpus in the California Supreme Court, which denied the petition on September 17, 2009. (Id., Ex. 10.) On February 16, 2011, the state high court denied another habeas petition filed on July 14, 2010. (Id., Ex. 12.)

Petitioner filed the instant federal habeas petition on April 14, 2011.<sup>1</sup>

## DISCUSSION

A claim presented in a second or successive petition under 28 U.S.C. § 2254 that was presented in a prior petition must be dismissed. See 28 U.S.C. § 2244(b)(1); Babbitt v. Woodford, 177 F.3d 744, 745-46 (9th Cir. 1999). A new factual basis for a claim previously presented is not sufficient to prevent it from falling under this section. See id. at 746 (ineffective assistance claim based on counsel's alcohol abuse successive of claim that counsel failed to present Post Traumatic Stress Disorder claim). Before a second or successive petition may be filed in the district court, the petitioner must first obtain an order from the court of appeals authorizing the district court to consider the petition. See 28 U.S.C. § 2244(b)(3)(A). Accordingly, a district court must dismiss any new claims raised in a successive petition unless the petitioner

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<sup>1</sup> This matter was transferred to this Court on April 26, 2011, from the Eastern District of California. (See Docket No. 3.)

1 received an order from the court of appeals authorizing the district court to consider  
2 the petition. See id. § 2244(b)(2).

3 Respondent contends that the instant petition is second or successive because  
4 Petitioner filed a prior habeas petition in this Court, see Hernandez v. Woodford, No.  
5 06-3975 WHA (PR) (N.D. Cal.), on June 27, 2006, which challenged the same  
6 underlying state conviction. (Mot. to Dismiss at 2.) In that case, the court denied all  
7 five claims presented on the merits. (Id., Ex. 8.) Because Petitioner has made no  
8 showing that he obtained prior leave from the Ninth Circuit to file a successive  
9 petition, Respondent contends this Court has no jurisdiction to consider Petitioner's  
10 renewed application for relief, and must dismiss the petition. (Id. at 4.)

11 In opposition, Petitioner does not deny that he filed a previous federal habeas  
12 petition as shown by Respondent, nor does he deny that the instant petition is second  
13 or successive. Rather, Petitioner contends that his petition is not untimely nor  
14 procedurally barred, and asserts his claims merit review. (Docket No. 19.) None of  
15 his contentions are sufficient to overcome the second and successive provisions of  
16 AEDPA which are applicable under United States v. Villa-Gonzalez, 208 F.3d 1160,  
17 1163 (9th Cir. 2000), such that an authorization order from the court of appeals is  
18 necessary before this Court may consider the instant successive petition. See 28  
19 U.S.C. § 2244(b)(2).

20 Petitioner has not presented an order from the Ninth Circuit Court of Appeals  
21 authorizing this Court to consider any new claims. See 28 U.S.C. § 2244(b)(3)(A). It  
22 is undisputed that Petitioner's first petition was denied on the merits on April 22,  
23 2008. See supra at 2. Accordingly, this Court must dismiss the instant petition in its  
24 entirety.

## 25 CONCLUSION


26 For the foregoing reasons, Respondent's motion to dismiss the petition as a  
27 second or successive petition, (Docket No. 10), is GRANTED. The instant petition is  
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DISMISSED as a successive petition pursuant to § 2244 (b)(1).

No certificate of appealability is warranted in this case. See Rule 11(a) of the Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254 (requiring district court to rule on certificate of appealability in same order that denies petition). Petitioner has not shown “that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” Slack v. McDaniel, 529 U.S. 473, 484 (2000).

This order terminates Docket No. 10.

DATED: 8/31/2012

  
EDWARD J. DAVILA  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

JOHN JESUS HERNANDEZ,

Case Number: CV11-02137 EJD

Plaintiff,

**CERTIFICATE OF SERVICE**

v.

R. LOPEZ et al,

Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on September 4, 2012, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

John Jesus Hernandez T-42740  
CALIFORNIA STATE PRISON  
P. O. Box 3471  
CORCORAN, CA 93212-3471

Dated: September 4, 2012

Richard W. Wieking, Clerk  
/s/ By: Elizabeth Garcia, Deputy Clerk